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In re Application of :
Hans R. Mueller et al :
Serial No.: 10/030,692 : PETITION DECISION
Filed: January 14, 2002 :
Attorney Docket No.: EPROV-17 :

This is in response to the petition under 37 CFR 1.181, filed November 25, 2005, requesting withdrawal of Finality of the last Office action.

BACKGROUND

A review of the file history shows that the examiner mailed a Final Office action to applicants on September 13, 2004, setting a three month shortened statutory period for reply in which claims 1-13, 17 and 32-34 were rejected under 35 U.S.C. 112, second paragraph, as indefinite. A second rejection of claims 1-2, 4, 8-19, 29-32 and 34-37 under 35 U.S.C. 112, second paragraph, was also set forth for different reasons of indefiniteness.

Applicants replied on January 17, 2005, by filing a Notice of Appeal and fees therefore. On March 14, 2005, applicants filed RCE papers and a formal reply to the Final Office action, as required. Claims 1, 6, 14 and 19 were amended, claims 20-28 and 32 were canceled and claims 43-46 were added and the rejections of record were responded to.

The examiner mailed a new Final Office action to applicants on April 25, 2005, setting a three month shortened statutory period for reply. The examiner noted the RCE paper filing, but maintained the rejection of claims 1-13, 17, 32-34 and 43-46 under 35 U.S.C. 112, second paragraph, for essentially the same reasons as before and replied to applicants' arguments. The examiner made the action Final based on the reasoning that no new rejections were set forth and all rejections of record of even new or amended claims could have been made in the previous Office action.

Applicants filed a new Notice of Appeal on August 25, 2005, and a reply to the Office action on November 25, 2005, as well as this petition. The reply amends claims 1, 6, 43 and 46 and adds claim 47 and responds to the outstanding rejection. Applicants, in both the petition and

amendment, argue that the examiner has not met the conditions set forth in M.P.E.P 706.07(b) for making a first Office action, following an RCE filing, Final. Applicants make no further argument than this.

DISCUSSION

Applicants state that the examiner has not followed Office procedure, as noted above, in making the Office action Final. However, the first paragraph of page 6 of the examiner's Office action of April 25, 2005, states clearly that all claims could have been finally rejected in the previous Office action and that the action is made Final even though it is the first Office action subsequent to an RCE filing. The examiner has thus fulfilled the requirements of M.P.E.P. 706.07(b). Applicants have not shown how the examiner or the Office action does not meet these requirements.

It is further noted that the examiner action complained of was made in April, 2005, and this petition was not filed until November, 2005, a period of approximately seven months. 37 CFR 1.181(f) states any petition complaining of an action by an examiner must be filed within two months of the action complained of. This petition does not meet that requirement and may be dismissed for that reason alone.

The petition is **DENIED**.

The application will be forwarded to the examiner for further consideration of the amendment filed November 25, 2005. Applicants remain under obligation to file an acceptable Appeal Brief within the time period allotted under 37 CFR 1.192, or as extended under 37 CFR 1.136(a).

Should there be any questions about this decision please contact William R. Dixon, Jr., by letter addressed to Director, TC 1600, at the address listed above, or by telephone at 571-272-0519 or by facsimile sent to the general Office facsimile number, 571-273-8300.



George C. Elliott
Director, Technology Center 1600